

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

IN THE MATTER OF:

ROBERT J. HUGHES

Appellant,

v.

DEPARTMENT OF PUBLIC SAFETY

Agency.

DOCKET NO. 98-07-163

DECISION AND ORDER

COPY

BEFORE John F. Schmutz, Esquire, Chairperson; Robert Burns, Vice-Chairperson; Dallas Green, and John W. Pitts, Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* § 5908(a).

APPEARANCES:

For the Appellant: Roy S. Shiels, Esquire
Brown, Shiels, Beauregard & Chasanov
108 East Water Street
P. O. Drawer F
Dover DE 19903

For the Agency: Laura Gerard
Deputy Attorney General
Carvel State Office Building - 6th Floor
830 North French St.
Wilmington, DE 19801

PROCEDURAL HISTORY

After a Fourth Step decision [Merit Rule No. 20.0340] dated July 16, 1998, upholding the action of the appointing authority imposing a five day suspension without pay, Robert J. Hughes filed a timely appeal with the Merit Employee Relations Board ("MERB" or "Board"). The appeal was the subject of an evidentiary hearing before the Board on August 25, 1999. This is the decision and order of the Board on the basis of the evidence presented at that hearing. The matter proceeded as a disciplinary hearing under Merit Rule No. 21.0230 and the Agency was designated as the Moving Party. The Appellant elected to have the hearing treated as a "public" hearing and the matter was

heard in open public session. At the request of the Appellant all witnesses were sequestered over the objection of the Agency.

SUMMARY OF EVIDENCE

Robert L. Pedersen, Communications Manager for the Division of Communications in the Department of Public Safety, was sworn and testified that on November 7, 1997 he was informed by Paul Chiprowski that there had been an incident between two employees where one had struck the other. Pedersen directed Chiprowski to get written statements from each of the participants. Written statements from James Bianco (State's Exhibit No. 1) and Robert Hughes (State's Exhibit No. 2) were received into evidence. Pedersen stated that he interviewed both Hughes and Bianco on November 7, 1997, and that the oral statement of each was consistent with their written statements made earlier that day. The incident related to the actions of Hughes and Bianco in adjusting the AM/FM radio in a state vehicle and the allegation that Hughes had slapped Bianco's hand as Bianco had reached for the volume control on the radio.

Mr. Hughes' handwritten statement provided that he had "smacked" the hand of James Bianco and told him to leave the radio controls of the vehicle alone. Mr. Pedersen stated that as he discussed the incident with him, Hughes became upset and so Pedersen told him to go home with pay because he did not want the situation between Bianco and Hughes to escalate. Pedersen testified that the handwritten statement from Bianco was consistent with his oral version and provided that as Bianco reached to turn up the radio Bob Hughes had slapped Bianco's hand hard enough to cause it to turn up the radio volume and to hit his coffee cup located in the cup holder below the radio.

Robert Pedersen testified that on November 17, 1997 when Hughes came back to work after an absence related to a death in his family, he called Hughes into his office and asked him again to explain the incident. Hughes again became agitated, according to Pedersen, and stated that he would do the same thing again if presented with the same situation. At that point Pedersen gave Hughes the letter (State's Exhibit No. 3) imposing a ten day suspension without pay. Pedersen identified State's Exhibit No. 4 as his memo to file dated November 17, 1997 that Hughes had expressed no remorse and felt that he was justified in what he did.

Pedersen testified that he believed that the five day suspension ultimately imposed was consistent with other punishments in the Department of Public Safety. The original ten day suspension which Pedersen had imposed was reduced, according to Pedersen, because there was insufficient documentation in Hughes' file about problems in the prior two years to justify a ten day suspension. Pedersen stated that, in his view, Bianco had heard some news on the radio; reached to turn up the volume and Hughes smacked his hand, cussed him out and told him not to touch the vehicle controls.

Pedersen also testified that the discipline imposed was imposed exclusively for the events of November 7, 1997 and not cumulative for prior incidents. He related that he originally felt that a ten day suspension was warranted because he viewed it as a serious matter and that no use of force by one employee to correct another employee is appropriate.

On cross examination, Pedersen stated that based upon his discussions with Bianco and Hughes there was no safety issue involved in this incident. However, he stated that if someone was attempting to enter a busy highway and was startled that there could be a safety problem.

Pedersen testified that there had been a prior incident with Hughes and an individual named McMaster where the individual felt threatened. There were other incidents in Mr. Hughes' file.

James Anthony Bianco, being sworn, testified that at the time of the incident he had been working for the state as a communications technician for about a month. According to Bianco, his hand written statement of the events of November 7, 1997 is correct and accurate. He and Robert Hughes were in a white Ford Cargo Van. Hughes was driving and the time was between 8:00 a.m. and 9:00 a.m. They were heading out of the Highway Department yard in Dover and were turning onto Route 13 by the Winner Ford dealership when Bianco reached to turn the volume up on the radio. As he reached for the radio Bob Hughes slapped his hand causing him to turn up the volume loudly and causing his hand to strike the coffee cup in the carrier below the radio. It was, according to Bianco, a slap with all four of Hughes' fingers and it was a sudden, unexpected shock. According to Bianco, you could hear the sound of the slap and after the slap Hughes went into a tirade about Bianco wanting to be in control. The ride back to the work place took 15-20 minutes and Bianco and Hughes exchanged comments during the trip back from the Highway Administration Building to the

shop in Camden. According to Bianco, upon arrival at the Camden shop, Hughes pulled him into the supervisor's office to report the incident. The supervisor, Robert Gates, asked Bianco to write out a statement of what had happened. Bianco testified that he spoke with Mr. Pedersen that afternoon, told him what had happened, and went back to work.

Robert L. Hughes, being sworn, testified that he has worked for the Communications Division for 28 years, has never been formally reprimanded, and has always gotten satisfactory or better ratings.

On the morning of November 7, 1997, at approximately 9:00 a.m. he was driving back to the shop with Jim Bianco. Traffic was very busy at that time as he tried to merge into traffic on Route 13 near the Winner Ford dealership. Because of the type of van he was driving he had to look out of the window to his left to find a place in the oncoming traffic into which to merge. While the van was moving and he was attempting to merge into traffic he heard a "god awful" noise as Bianco had turned the radio up wide open. He looked over and saw Bianco's hand on the radio and moved his hand off. Hughes testified that he had no idea that Bianco was about to turn up the radio. He was startled and totally distracted. Hughes reacted automatically in what he felt was an emergency situation. Hughes testified that he was upset at Bianco's behavior and determined to report the matter to their superior as an important breach of safety. Robert Gates, the supervisor, told Hughes that the matter would go to higher authority and asked Hughes to write out a statement about the incident.

Hughes stated that several hours later he spoke with the director Mr. Pedersen who said, according to Hughes, that he was not interested in hearing Hughes' side of the story and that Hughes was to go home with pay. On November 17, 1997, according to Hughes, Pedersen called him into the office and gave him the letter suspending him for ten days without pay and again told him that he was not really interested in hearing his side of the story.

Hughes introduced two pictures of what he represented were the interior of the van he had been driving when the incident occurred. He stated that while he wrote in his statement that he had "smacked" Bianco's hand, what he did was to move it off the radio and did not slap his hand.

APPLICABLE MERIT RULE

MERIT RULE 15.1

Employees shall be held accountable for their conduct. Measures up to and including dismissal shall be taken only for just cause. "Just cause" means that management has sufficient reason for imposing accountability. Just cause requires:

- showing that the employee has committed the charged offense;
- offering specified due process rights specified in this chapter; and,
- imposing a penalty appropriate to the circumstances.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appellant believes that he should not be disciplined for the events giving rise to the five day suspension imposed upon him by the Department of Public Safety. Mr. Hughes contends that he brushed Mr. Bianco's fingers from the radio with his own two fingers and proceeded to regain control of the vehicle. He denies having struck Mr. Bianco. Mr. Bianco testifies that he was slapped with all four of Hughes' fingers. Their perception and recollection of the events of the day are clearly different. There are other conflicts in the testimony including whether or not Mr. Pedersen asked Mr. Hughes to explain his version of the events or told him that he was not interested in such explanation.

The Board has had the opportunity to observe the witnesses and to consider their testimony and there is clearly conflict as to exactly what occurred. The Board is in agreement with Mr. Pedersen's observation that force is not appropriate to be used by one employee against another and that such incidents should be viewed as serious. However, the Board finds that Mr. Hughes' action in moving Mr. Bianco's hand off the radio volume control was not an intentional striking of Mr. Bianco but rather an instinctive reaction to being startled by the unexpected loud volume of the radio in a situation where he was attempting to merge into heavy traffic. Mr. Bianco's testimony that Mr. Hughes' action was in the nature of a preemptive strike as he reached for the radio which then caused the volume to suddenly go up is less plausible than Mr. Hughes' explanation. Mr. Hughes is a 28 year state employee who has always received satisfactory or better ratings and, while there was some discussion of prior incidents involving Mr. Hughes, both Mr. Pedersen and the Department's legal

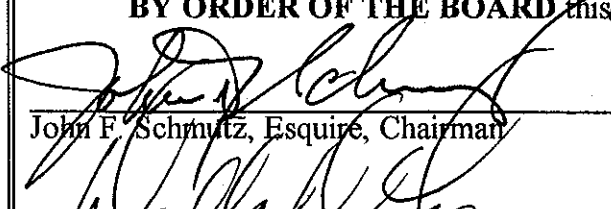
counsel took the position that the November 7, 1997 incident was the sole basis for the discipline imposed. It was Mr. Hughes who was insistent on November 7, 1997 in reporting the incident to his supervisor, Robert Gates. This is not the action of an aggressor in this encounter. The Board unanimously finds that Mr. Hughes' startled reaction was not an intentional act of disciplining or striking of Mr. Bianco but rather a reactive attempt to reduce the volume of the radio to regain control of a situation while attempting to enter into the flow of traffic. As such it was not an action for which accountability in the form of a five day suspension should be imposed under Merit Rule 15.1.

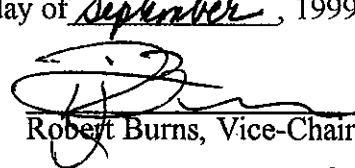
The Board finds that Mr. Hughes has established by a preponderance of the evidence that there was not just cause to hold him accountable for his actions in attempting to regain control of the vehicle and therefore concludes that his appeal should be upheld.

ORDER

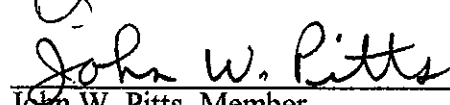
By the unanimous vote of the members of the Board hearing this matter, the action of the Appointing Authority imposing a five day suspension without pay upon Robert J. Hughes in these circumstances is overturned and the appeal is upheld. Mr. Hughes is to be made whole for the five day suspension by the return of all pay and entitlements and all reference to the suspension are to be removed from his personnel record.

BY ORDER OF THE BOARD this 22nd day of September, 1999.


John F. Schmutz, Esquire, Chairman


Robert Burns, Vice-Chairman


Dallas Green, Member


John W. Pitts, Member

APPEAL RIGHTS

29 Del. C. § 10142 provides:

(a) Any party against whom a case decision has been decided may appeal such decision to the Court.

(b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.

(c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing Date: 9/23/99

BY John Lee Turner

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Agency's Representative

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